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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

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| UNITED STATES OF AMERICA, |) | No.: CR 14-0196 CRB |
| |) | |
| v. |) | UNITED STATES' SUPPLEMENTAL MOTIONS |
| |) | <i>IN LIMINE</i> |
| KWOK CHEUNG CHOW, et al. |) | |
| |) | |
| Defendants. |) | Court: Honorable Charles R. Breyer |
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I. INTRODUCTION

The government previously filed Motions *in Limine*. These supplemental Motions *in Limine* are being filed due to recent filings by defendant Chow and out of an abundance of caution. Government counsel does not want to be in the position of making objections during defense counsel's opening statement and is filing this Motion in order to hopefully avoid that occurrence.

II. MOTIONS IN LIMINE

A. Defendant Chow Was Previously Barred from Arguing Selective Prosecution or Outrageous Government Misconduct and the Court's Order Should be Enforced During Trial

On September 28, 2015, the Court unambiguously granted the Motions *in Limine* by the government to preclude irrelevant and inaccurate arguments regarding outrageous government misconduct and selective prosecution. *See* Tr. at 4-6. Counsel for defendant Chow, Mr. Serra, was not present at the hearing. There should be no mistake or miscommunication regarding that Order and any such arguments by defendant Chow during opening statement or during trial should be summarily cut off and stricken from the record. The Court has already properly held that such issues are for the Court as legal matters and not for the jury. *Id.*

B. Defendant Chow Elected not to Argue Entrapment to the Jury and Should be Barred from Doing So During Trial

Defendant Chow elected not to argue entrapment during this case. He clearly did so because (1) he can't demonstrate inducement, and (2) the evidence of Chow's predisposition is lengthy and compelling. Therefore, Chow should be barred from making entrapment arguments and examinations related to that subject matter during trial.

C. Defendant Chow Should not be Permitted to Make a Duress Argument Or, In the Alternative, Chow's Conduct Would Become Admissible to Explain the Government's Actions

Defendant Chow's recent filing regarding alleged Outrageous Government Misconduct is lengthy but baseless. Nonetheless, Chow makes the unsubstantiated claim that he was somehow forced into a life of crime and return to criminal organizations by the government. In part, he seems to claim

1 that the FBI's withdrawal of support for an S-Visa, lack of an ability to find work, and that he did not go
2 into the Witness Security ("WitSec") program was what caused him to turn back to his old ways. These
3 claims are false, and can easily be refuted by the government if necessary.

4 The claims, however, are also totally irrelevant. Chow cannot possibly make out a claim of
5 duress, justification, or necessity, however, each of which require not only imminent threat of death or
6 great bodily harm, but also require reporting to law enforcement at the earliest possible time, no
7 reasonable legal alternative, and other elements that Chow cannot possibly demonstrate. *See Ninth*
8 *Circuit Manual of Model Jury Instructions*, Instructions 6.5, 6.6, and 6.7. Since Chow's apparent claims
9 – even if they were true – do not constitute an affirmative defense, the jurors need not consider the
10 claims and they are rendered irrelevant.

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12 In the alternative, however, should Chow seek to pursue this line of argument and/or evidence,
13 then it would open the door to the admission of reporting by various sources and witnesses – including
14 Allen Leung – to the FBI and to the San Francisco Police Department regarding Chow. Not for the truth
15 of the reports themselves, but to explain the FBI's determination that it could no longer support Chow's
16 S-Visa application in good faith. That information includes Allen Leung's repeated interviews with FBI
17 that Chow was in the process of attempting to take over the Hop Sing Tong and the Chee Kung Tong
18 and then subsequently that Chow was extorting Mr. Leung. Despite FBI's offers to assist in further
19 investigating the threats to Mr. Leung, he declined to wear a recording device against Chow out of fear
20 for his safety. Additionally, FBI was receiving other credible reports of Chow's return to organized
21 criminal activity and that Chow was surrounding himself with individuals who were involved in
22 criminal activity. These reports would become admissible should Chow try to accuse the FBI of
23 withdrawing support for his S-Visa without cause.

24 **D. Defendant Chow Should be Precluded from Argument Regarding Polygraph Results**
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1 During the course of the government's investigation, one of the witnesses elected to submit to a
2 polygraph examination. By that witness' own admission, he was not being completely truthful with the
3 government at the point that he submitted to the examination. The fact that the witness was previously
4 withholding information, of course, will be presented to the jury and has been disclosed to the
5 defendant. The administration and results of the polygraph examination, however, are not admissible in
6 evidence and are not appropriate for opening statements or for argument by counsel. *United States v.*
7 *Bowen*, 857 F.2d 1337, 1341 (9th Cir. 1988) ("It is well settled in this Circuit that polygraph evidence is
8 disfavored and cannot be introduced into evidence to establish the truth of the statements made during
9 the examination"). For this reason, defendant should not make any reference to polygraph examinations
10 and the results during trial. Furthermore, the government notes that Chow was given an opportunity to
11 submit to a polygraph examination regarding the Leung homicide during that investigation and he
12 declined to do so, as was his right. It would be inappropriate, however, for Chow to now try to make
13 reference to inadmissible evidence regarding a polygraph examination when Chow himself refused to do
14 so.
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17 **E. Statements by Counsel Should not be the Subject of Argument or Evidence**

18 Chow has previously referenced statements by counsel and matters that were submitted in
19 writing, but not under seal, in his pleadings. Chow also attempted to claim that he would call at least
20 one government attorney to testify, but has not issued a subpoena to that attorney or followed the
21 appropriate regulations to be able to call that attorney to testify. Nor would any such efforts be
22 appropriate – rather it would demonstrate a fear of opposing counsel and an effort to have counsel
23 recused. Obviously, the statements by counsel and the written work of counsel would be inappropriate
24 to argue if they will not be admitted into evidence. It further puts counsel in the position of having to
25 explain prior statements and/or writings in context. For these reasons, Chow should be barred from
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1 making such references. Alternatively, the statements of Chow's counsel would, in theory, be
2 admissible and that would place Chow at a grave disadvantage in defending his case at trial.

3 **III. CONCLUSION**

4 For the reasons stated above, the government hereby respectfully requests that the Court grant
5 the government's Motions *in Limine*.

6 DATED: November 8, 2015

Respectfully submitted,

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9 /s/
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